In the Supreme Court of the United States

October Term 1975

No. 75-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

BRIEF OF PETITIONER

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STATEMENT OF FACTS

The State of Oregon (State) filed a statutory ejectment action[1] in the Circuit Court of the State of Oregon against Corvallis Sand and Gravel Company (Corvallis Sand) to recover the bed to high

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[1] At common law ejectment was a possessory action. Under Oregon law such a proceeding determines title. Weatherford v. McKay, 59 Or 558, 560, 119 Pac 969 (1911).

water mark of the Willamette river, a fresh water stream which has traditionally been considered navigable. State's claim of ownership was based on sovereignty. The complaint contained no allegation that Corvallis Sand was in any way interfering with the public right of navigation, fishery or related uses. (Public rights.) State also sought damages for removal of sand and gravel materials from the bed of the river at the going royalty rate per cubic yard. (A. 5)[2]

Corvallis Sand was a riparian owner of the bank adjacent to the disputed property.

Corvallis Sand demurred to the complaint on the ground the same failed to state facts sufficient to constitute a cause of action. (A. 26) The demurrer was overruled. (A. 27)

The evidence adduced at the trial established that Corvallis Sand had been conducting sand and gravel removal operations in the area continuously since about 1920 and that State had had actual notice of the operations since not later than 1933. (Ex. 33).[3]

The sand and gravel removal operations had been conducted under permits issued by the Army Corps of Engineers. (Exs. 280-307)

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[2] A. refers to Appendix.

[3] This was an opinion of the Attorney General of Oregon ruling that Corvallis Sand's operations in the area were in violation of the state's property rights. Ops. A.G. of Oregon, 1933-34, p. 375.

The trial court entered judgment granting portions of the disputed property to high water mark to State and awarding it money damages for sand and gravel removed from those areas. (A. 190)

On appeal, the Oregon Court of Appeals and the Supreme Court of the State of Oregon affirmed the overruling of the demurrer and the award of the property (except for a small area) and damages.

SUMMARY OF ARGUMENT

(The "Statement of Facts" is incorporated by reference.)

I

Ownership of Beds of Navigable Fresh Water Streams.

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The recent decision of Bonelli Cattle Co. v. Arizona, 414 US 313, 36 L.Ed.2d 526, 94 S.Ct. 517 (1973) held that the ownership of the beds of navigable fresh water streams is a matter of federal common law, that the states' interest in the beds of navigable fresh water streams is limited in nature and recognized the importance of riparian ownership. The decision also expressee concern over the taking of property without just compensation as applied to riparian owners.

The primary issue in this case is the determination of the rights of the state and of the riparian in the beds of navigable fresh water streams.

At common law, both in England and in this country, the sovereign or state owned the beds of navigable streams up to the head of tide water. This ownership was dual in nature, one being the jus publicum (public rights) which was a trust obligation of the Crown or the state to protect the public in its use of tidal waters for purposes of navigation and fishing. The public rights were inalienable, were paramount to the jus privatum (private rights) and could not be destroyed or made conditional.

The private rights were a proprietary interest which the King or a state held in the bed of tidal streams. Private rights could be, and were, sold, given away and otherwise disposed of, always subject to the public rights.

Under the common law the public had a right to navigate on fresh water streams but the private rights were vested in the riparian owners to the thread of the stream.

Most of the original 13 states adopted the common law as it applied to the ownership of the beds of tidal and fresh water navigable streams. Some subsequently modified the law either by statute or by judicial decision.

Most of the states subsequently admitted to the Union have, either by constitutional or statutory provision, declared that the general common law was adopted. However, in deciding the relative rights of the state and the riparian in navigable fresh water streams some states followed the applicable common law, others declared that the riparian owns

only to low water and others, such as Oregon, declared that the bed is owned from bank to bank by the state. At least one state, Washington, has gone so far as to declare that the riparian has no rights, that the fresh water stream can be diverted rendering riparian land non-riparian, all without compensation. This court has endorsed the ruling.

The result is that no area of law has "produced more uncertainty, caused greater conflict of opinion ... [and] produced more diverse results that that relating to the title to land under the waters".

The different rules have also resulted in complex litigation and adoption of diverse rulings as to what constitutes high water, low water, accretion, and other essentials of riparian ownership.

Another consequence has been the taking by state courts of riparian property without due process, the courts often doing so arbitrarily, without legal precedent and in violation of legal precedent.

The sources of the diverse rulings have been the following:

1. Failure to distinguish between the public rights and the private rights and to recognize that the protection of the public rights is not dependent on ownership of the underlying bed and is not related to such ownership. Many courts have failed to perceive the distinction between the two and their significance. The result has been a blending of the concepts into a "trust" theory under which states

have claimed total ownership of navigable fresh water streams and have failed to recognize that the state's proprietary interest is limited to tidal waters.

2. Failure to understand and properly apply the "equal footing" doctrine.

This doctrine, contained in the admission acts of new states, requires that new states be admitted on an "equal footing" with the original 13 states as to political and sovereign matters. The doctrine requires that new states are not inferior or superior to the original 13 states. In the area of riparian ownership, the doctrine has been misinterpreted to permit the new states to enter on a footing superior to the original 13 states. The result has been that the courts of many new states, in violation of due process and of their constitutional and statutory provisions making the common law binding, have declared that riparians have less interest in the beds of navigable fresh water streams than riparians in the original states.

3. Misunderstanding of the significance of the provision in the various admission acts that the navigable streams shall be "public highways". Some courts have seized upon this declaration as a basis for declaring that the state owns the beds of all "public highways". The concept of public highways is part of the basic concept of public rights of navigation and is unrelated to the ownership of the beds, such ownership being part of the private rights.

4. The exercise of authority by the state courts to arbitrarily declare the rights of riparians on fresh water navigable streams. State courts, unhindered, have determined the relative rights of the states and the riparian owners in the beds of navigable streams. The source of this authority is obscure. In making determinations of ownership the courts have not only violated due process but have arbitrarily taken unto themselves authority which should properly be vested in the people or in the legislature -- the power to determine the proper rights of the state in the beds of navigable fresh water streams and the disposition of those rights.

5. Failure to apply the common law. The common law is based on wisdom born of experience. It is simple, it is unfettered with problems of high water, low water, and other related issues. By applying the common law, that is, by declaring that the private or proprietary rights on navigable fresh water streams belong to the riparian, subject to the public rights of navigation and related uses (now expanded to include recreation) the vast controversy in this area would be resolved.

II

Right of State to Claim Damages for Removal of Sand and Gravel.

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The trial court awarded money damages to State on a cubic yard basis for sand and gravel materials removed from the bed of the river by Corvallis Sand.

At common law the riparian had the right to remove stone and sand so long as he did so without injury to other individuals or the public.

Bonelli, supra, declared that the "state's title is to the 'river bed as a bed'", citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill the Alabama court stated of the state's ownership of the bed of a navigable fresh water stream:

> "... is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

The limited nature of the state's interest in the beds of navigable fresh water streams is in the public rights of protecting navigation and related uses. It has no proprietary interest in the beds and specifically does not own the individual grains of sand or pebbles of gravel.

State cannot collect damages for removal of sand and gravel materials in the face of proof the removal operations were conducted under permits granted by the Army Corps of Engineers.

PROPOSITION I

IN THE ABSENCE OF PLEADING AND PROOF THAT THE PUBLIC RIGHTS OF NAVIGATION, FISHERY AND RELATED USES ARE BEING IMPAIRED OR INTERFERED WITH THE STATE OF OREGON CANNOT MAINTAIN EJECTMENT AGAINST A RIPARIAN OWNER TO RECOVER THE BED OF A FRESH WATER NAVIGABLE STREAM WHERE ITS CLAIM OF OWNERSHIP IS BASED ON SOVEREIGNTY RATHER THAN GRANT.

ARGUMENT

At the time our country was formed it was the common law both in England and in the United States that the beds of navigable fresh water streams belonged to the riparians, the ownership extending from the respective banks to the thread. 1 Farnham, Waters and Water Rights (hereafter cited as Farnham), Sec. 51, note 18.(4)

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(4)"In Avery v. Fox, 1 Abb. (US) 246, Fed. Case No. 674, it is said the law is too plainly settled to allow discussion at this day that the owner of land bordering on a nav igable stream in which the tide does not ebb and flow owns the bed beneath the water to the center of the stream."

Under the common law the riparian owned to the thread on fresh water streams, whether navigable or not.

(Under the common law the state owned the beds and waters of tidal streams which were capable of navigation for commercial purposes. 78 Am.Jur. 2d 817, Waters, Sec. 380.[5])

On becoming sovereign, the original 13 states adopted the following rules as to the ownership of the beds of navigable fresh water streams to the head of tidewater:

1. The following original states adopted the common law: Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, South Carolina[6] and Rhode Island[7].

2. In Pennsylvania the riparian owned the soil to low water on navigable fresh water streams but the state owned between the low water marks. Farnham, Sec. 53(c), p. 254. The basis of the rule appears to be the unique status of Pennsylvania's land which had been owned by William Penn as a proprietorship under grants from the Crown. Gould, Law of Waters (hereinafter cited as Gould), Sec. 65.

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[5]For a detailed analysis of the history of the ownership of the beds of navigable fresh water streams see Shively v. Bowlby, 152 US 1, 38 L.Ed. 331, 14 S.Ct. 548 (1893).

[6]Farnham, Sec. 51, p. 246. New York excepted the Hudson River above tidewater.

[7]Gould, Sec. 172

3. Virginia initially followed the common law until the passage of a statute in 1819 (which applied to subsequent grants only) which reserved the bed between low water marks to the state. Farnham, Sec. 52, p. 253 and Gould, Sec. 178.

4. North Carolina initially followed the common law but then adopted a statute reserving the bed between high water marks to the State. Gould, Sec. 60. This applied only to rivers in which seagoing vessels could navigate. Farnham, Sec. 52, p. 252.

States since admitted to the Union have adopted the following rules of ownership:

1. Follow the common law: Illinois, Kentucky, Maine, Michigan, Nebraska, Ohio, Washington, and Utah. Farnham, Sec. 51, p. 251.

2. In the following states the riparian owns to low water: Alabama, Indiana, Louisiana, Minnesota, Missouri, Montana, South Dakota, Tennessee, Vermont and West Virginia. Vol. I, Waters and Water Rights, The Allen Smith Co., 1967 (hereinafter cited as Smith), Sec. 42.2(B), p. 270.

3. In the following states the state owns the beds of navigable fresh water streams from high water to high water: Arkansas, Florida, Idaho, Iowa, Mississippi, Oregon, and Wisconsin. 78 Am. Jur.2d 829, Waters, Sec. 386.

4. Texas applies a special rule. Pre-1837

Mexican and Spanish grants include the bed of the stream. Post-1836 grants stop at the bank if the stream retains an average width of 30 feet from the mouth up. Smith, Sec. 42.2(C), p. 272.

(The above lists are not entirely correct as some states change their rule from time to time while others reach different conclusions depending on the situation in each case.)

5. States with identical basic law have arrived at diametrically opposite conclusions as to ownership of beds of navigable fresh water streams, Oregon and Nebraska being an example.

Oregon was admitted to the Union in 1859. Its original constitution contains a provision continuing in force all laws of the territory of Oregon. Article XIII, Sec. 7.[10] Included in the territorial law was article 1 of section 2 of the Oreganic law of the provisional government of Oregon adopted July 26, 1845, which entitled the people to the benefits of the common law.[11] The Oregon supreme court has ruled that the common law is in

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[10]"All laws in force in the territory of Oregon when this Constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

[11]"The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus and trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings, according to the course of common law."

force in Oregon.[12] Oregon nevertheless holds that the state owns the beds of fresh water navigable streams from high water to high water. (Supra p. 11)

Nebraska, admitted in 1867, has ruled that by virtue of a statute adopting the common law the state has no interest in the beds of navigable fresh water streams. Kinkead v. Turgeon, 109 NW 144, 744-45 (1906).[13]

The diversity of rules as to the ownership of the beds of navigable fresh water streams has provoked the following comments:

> "Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or

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[12] "That the common law of England modified and amended by English statutes, as it existed at the time of the American Revolution, as far as it was general and not local in its nature and applicable to the conditions of the people and not incompatible with the nature of our political institutions or in conflict with the constitution and laws of the United States or this state, except as modified, changed or repealed by our statutes, has been adopted and is in force in this state ..." United States F.&G. Co. v. Bramwell, 108 Or 261, 264, 217 Pac 332 (1923).

[13] The Nebraska court uses language almost identical to that of the Oregon court in describing the role of the common law in that state.

produced more diverse results than that relating to the title to the land under the waters. This difficulty and diversity of result has arisen from either failure to perceive clearly the common-law principles applicable, or a hesitation to apply them for fear of the result."

Farnham, Sec. 30, p. 165

"There has been much conflict as to the title of land under water. In many instances, different conclusions have been arrived at in the same jurisdiction under various circumstances, and the courts have differed in the method of reasoning, as well as in respect of the grounds which have influenced their determination. Since each state in this country has been at liberty to determine over what submerged lands its sovereign prerogative of ownership shall be exercised, many and diverse views have been adopted. In some states statutes have been passed modifying or abrogating the common-law rules and presumptions, while in others the courts have been permitted either to follow the common-law or civil-law rules relating to boundaries, or to establish their own doctrines."

56 Am.Jur. 864, Waters, Sec. 451

The sources of the confusion as to the relative rights of the state and the riparian are the following:

1. Misunderstanding of the concepts of jus publicum and jus privatum.

2. Misapplication of the equal footing doctrine.

3. Misunderstanding of the designation in admission acts of navigable waters as being "common highways and forever free".

4. Misunderstanding by the state courts of their authority to claim or disclaim ownership of the beds of navigable fresh water streams.

5. Misapplication of the federal definition of navigability adopted for purposes of the commerce clause in the determination of the ownership of beds underlying fresh water streams.

6. Failure to apply the common law.

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1.

Misunderstanding of the Concepts of Jus Publicum and Jus Privatum.

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Under the common law the jus publicum (public right) was the right of passage and repassage by the public over water with their goods. The water was not to be obstructed by nuisances. Farnham, Sec. 36, p. 167. It was the right of the public to use the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high water mark, for the development of commercial navigation. Bards v.

Herman, 114 NYS 1098, 1101, 62 Miss. 428. It also included the public right of fishery. Gould, Sec. 24, p. 51. It was the right of jurisdiction and control by the King or state for the benefit of its citizens, which is similar to the jurisdiction over public highways by land, where the underlying fee may be in private ownership. In England the King, and in this country the state, may intervene to protect the public rights. The rights are inalienable by the state and any attempted conveyance of them is a nullity. The private rights are at all times subject to the public rights. Gould, Sec. 17, p. 34 and following, Farnham, Sec. 36, p. 138. The concept of jus publicum applied only to tidal waters. Farnham, Sec. 36, p. 168.

In lands under tidal waters there existed concurrently with the public rights the jus privatum (private rights). These were proprietary in nature and were subject at all times to the public rights. Gould, Sec. 17, p. 35 and Bards, supra.(14)

The King could and did dispose of the public rights. Farnham, Sec. 36, p. 166.(15)

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(14)"The 'jus privatum' was the right of the King to convey and vest in others of his private will the title to and over the sea, its arms and rivers, where the tide ebbed and flowed, and the shore below high-water mark, subject however to the jus publicum. The term 'jus publicum', however defined, included the ownership of the soil between high and low water marks.

(15)"The King granted title under the water, and exclusive fishery rights therein, as suited

Farnham states:

> "The governmental or prerogative power of the English crown has inadvertently been transformed into a trust by some of the courts in the United States, the result of which has been to carry the decisions beyond what would be possible under the common-law theory, and which, if continued, may result in needless inconvenience, if not in actual obstruction of progress."
>
> Farnham, Sec. 36(a), p. 172

Citing Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997, Farnham quotes from the opinion of Chief Justice Taney on the validity of a grant of fishery rights to the proprietors of New Jersey:

> "The country mentioned in the letters patent was held by the King in his public and regal character, as the representative of the nation and in trust for them ... The dominion and property in navigable waters and in the lands under them being held by the King as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund entrusted to his care for the common benefit."

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his pleasure. And there is no doubt that all land under the water which could be profitably used by the individuals passed into private ownership."

(For detailed discussion of jus privatum and jus publicum see Farnham, Sec. 36.)

Farnham comments:

> "This language applied solely to the governmental or prerogative right of the Crown and did not in any way affect its property or private right. But a failure to distinguish between these two rights has in some instances been extended so as to include both the prerogative and the private right, so that it has been held to preclude any grant by the state of its title under navigable water, even though such grant might be greatly to the public advantage by the filling and reclaiming of lands which were useless for any purpose of navigation or fishery. This doctrine has been carried further in Wisconsin than elsewhere, the court holding that the state has no proprietary interest in the land under the water, but holds it in virtue of its sovereignty, and in trust for navigation and fishery."
>
> Farnham, Sec. 36(a)

Farnham then points out that the public rights are paramount and inalienable.

In short, the public rights are nothing more than a navigational and recreational[16] servitude. The private rights are no different than property rights in dry land except they are subject to the public rights.[17] Whether it is stated that the

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[16] The public rights have been expanded to include recreation. Smith, 37.2(C), p. 209-210.

[17] Gould, Sec. 17, p. 35 draws the analogy

private rights are subject to the public rights, or that the title is held for the public, the legal meaning is identical. Smith, Sec. 37.2(C), p. 209-210.

Those authorities which have misunderstood the nature and significance of the trust obligation of the state have converted it into an ownership concept on the part of the state rather than recognizing it is a duty on the part of the state to protect the public use of navigable waters. Farnham, Sec. 36(a).

Some states, such as Oregon, have gone so far as to convert the concept of the public rights and the private rights into a profit-making enterprise for the benefit of the state treasury. ORS 327.405.(18)

The courts of Oregon have refused to recognize the existence of statutes authorizing the sale of beds of navigable streams which have been continuously in effect since 1899. State v. Corvallis Sand and Gravel Co., 526 P2d 469, 487.(19)

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to a public highway (jus publicum) located on private property.

(18)(Oregon Revised Statutes) "The common school fund shall be composed of the proceeds from ... the sale of submerged and submersible lands ..."

(19)"Between 1878 and 1963, there was no statutory provision by which the state could grant title to any non-tidal portion of the Willamette River. See State v. McVey, supra, Corvallis Sand

The merger of the public rights and private

and Gravel v. Land Board, supra. The authority of the state to grant title to submerged and subersible lands in the Willamette River in the Corvallis area rose after 1963."

The following was set forth in Corvallis Sand's brief on appeal to the court of appeals and petition for review by the Supreme Court of Oregon:

"6. Laws of 1899 (page 148) (Section 8) authorized the State Land Board to sell 'tide lands, tide flats not connected with the shore, and all lands held by the state by virtue of her sovereignty, ***' (Emphasis supplied) (As stated in Taylor Sands Fishing Company vs State Land Board, 56 Or 157, 159, 108 Pac 126 (1910)"

'This section was enacted in 1899, probably as a consequence of the decision in Elliott vs Stewart, 15 Or 259 (14 Pac 416), in which case it was held that under the prior law, providing for the disposal of State lands, no authority had been conferred to convey the title to sand bars in the Columbia River not connected with the shore. Oregon, on its admission to the Union, February 14, 1859, became the owner of all that part of the Columbia River, a navigable stream, lying south of the north boundary of the State. Act February 14, 1859, c. 33, 11 Stat. 383. Subject to the paramount right of navigation, Oregon, when it was thereafter empowered by enactment could, by its constituted agents, convey any of the islands in that river or any land forming a part of its bed.' (Emphasis supplied).)

rights into an indivisible entity has led some

"By the 1899 act the legislature expressed its disapproval of the courts' position that the state couldn't sell the beds of navigable streams.

"7. Laws of 1907 (Chapter 117, Section 9) 'The State Land Board is hereby authorized to sell or lease all lands owned by the State'. (This was a general revision of the 1878 act and amendments subsequent thereto.)

"8. Laws of 1920 (Chapter 32, Section 1):

'The State Land Board hereby is authorized to lease the beds of navigable portions of navigable streams for the purpose of removing gravel, rock and sand therefrom.' (Balance of statute deals with bidding.)

"9. Laws of 1943 (Chapter 175, Section 4) (amending Laws of 1907, Chapter 117):

'The State Land Board hereby is authorized to sell or lease all lands owned by the state, and to make such rules and regulations, ***'

"10. Laws of 1963 (Chapter 376, Section 3):

'The State Land Board shall have the power to sell, lease or trade submersible or submerged lands owned by the state and new lands created upon submersible or submerged lands owned by the state in the same manner as provided for tide and overflow lands***'

"'Submersible' lands were defined in Section 1 as:

" 'Means those lands which lie between the line of ordinary high water and the line of ordinary low water of the navigable rivers of this state whether such waters be tidal or non-tidal.'

states to deprive the riparian owner on navigable fresh water streams of any of his natural property rights. 78 Am.Jur.2d 706, Waters, Sec. 262, 65 CJS 216, Navigable Waters, Sec. 61. This court has approved the rule. Port of Seattle v. Oregon and Washington R. Co., 255 US 56, 41 S.Ct. 237, 65 L.Ed. 500, 506 (1920).(20)

"'Submerged lands were defined as:

"'Means those lands which lie below the line or ordinary low water of the navigable waters of this state whether such waters be tidal or non-tidal.'."

(20)"Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the state of uplands abutting upon a natural navigable waterway grants no right of any kind, either in land below high water mark (Eisenbach v. Hatfield, 2 Wash. 236, 12 LRA 632, 26 Pac 539), or in, to or over the water (VanSiclen v. Muir, 46 Wash. 38, 41, 89 Pac 188), except the limited preferential right conferred by statutes upon the owner of the upland, to purchase the shoreland if the state concludes to sell the same. Act of March 26, 1890, Section 11 and 12, Laws of Washington 1899-1890, p. 435. The grantee of the upland cannot complain of another who erects a structure below high water mark. Muir v. Johnson. He does not acquire any right of access over the intervening land and water area to the navigable channel. Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 550, 551, 109 Pac 833. So complete is the absence of riparial or littoral rights that the state may--subject to the superior right of the United States--wholly divert a navigable stream,

Farnham criticizes the rule severly. Farnham, Sec. 63, p. 281.[21] See also 78 Am.Jur.2d 706, Waters, Sec. 262.

This court has recognized that riparianess is one of the "most valuable feature[s]" which land bordering on water may have. Bonelli, supra, 38 L.Ed. at 539.

American Jurisprudence 2d fails to recognize that the public rights do not include riparian rights. 78 Am.Jur.2d 704, Waters, Sec. 261.[22]

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sell the river bed, and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. Newell v. Loeb, 77 Wash. 182, 193, 194, 137 Pac 811; Hill v. Newell, 86 Wash. 227, 228, 149 Pac 951."

[21]"The right of the riparian owner to have the stream continue in place, and to make such use of it as he can while the water flows past his property, certainly must be a proprietary right. It does not depend on the acquiescence or good will of the state, and is a right of which the riparian owner cannot be deprived without receiving compensation. ... The rights attached to riparian ownership are not affected by the character of the water and depend upon lateral contact with the water, and not upon ownership of the soil under water."

[22]"Riparian rights in the several states are settled by the respective states for themselves. It is for the state to determine to what waters, and to what extent, the prerogatives of the state shall

Riparian rights are proprietary. The only limitation on the riparian is that in the exercise of his rights there be no interference with the public rights. 78 Am.Jur.2d 534, Waters, Sec. 90.

Most jurisdictions have adopted the common law which protects the riparian in his rights. 78 Am. Jur.2d 704, Waters, Sec. 261 citing Shively v. Bowlby, 152 US 1, 38 L.Ed.331, 337, 14 S.Ct. 548.

The failure to recognize the distinction between the public rights and the private rights, the latter being proprietary in nature, has led at least the Oregon court to rule that neither prescription nor estoppel is available to the riparian against the state in its proprietary capacity. State v. Corvallis Sand and Gravel Co., supra, p. 487.

At common law prescription ran against the King as to his proprietary interest in navigable waters. Shively, supra, at 336, Farnham, Sec. 45(b), p. 225, and Gould, Sec. 22.

Estoppel also applies against the state where it claims ownership of the bed below high water. Iowa v. Carr, 191 Fed. 257, 8th Cir. 1911.(23)

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be exercised in regulating and controlling the shores of such waters and the land under them, and if any state determines to resign to riparian proprietors rights which properly belong to it in its sovereign capacity it is not for others to raise objections." (Emphasis supplied.)

(23)"But the great weight of authority, the

Under its duty to protect navigation, and under the reservation in the admission acts of navigable rivers as public highways (discussed infra, p.) the federal government has taken over the chief responsibility of the King to protect the public rights. There is little left to the states. What responsibility is left to the state is carried out under its police powers. 78 Am.Jur.2d 521, Waters, Sec. 78, p. 526, Sec. 80 and p. 831, Sec. 390. It is an abuse of the police power for states to use their power to protect their proprietary interests as a competing claimant to property. This abuse is not expressed in court decisions but is present whenever the state seeks to extend the mantle of "sovereignty" to private rights by failing to distinguish them from public rights.

The failure of courts to recognize the distinction between the public rights and the private rights and the independence of each from the other has been a major source of confusion in the decisions dealing with the ownership of the beds of navigable rivers.

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stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judiciable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances."

2.

Misapplication of the Equal Footing Doctrine.

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As each new state was admitted, its admission act contained a provision substantially as follows:

> "That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, ..."
>
> Oregon Admission Acts, 11 Stat. 383 (1959)

"Equality" means that the new states are not less or greater, or different in dignity or power from states previously admitted. 81 CJS 897, States, Sec. 8 citing United States v. Texas, 339 US 707, 70 S.Ct. 918, 94 L.Ed. 1221, 1227 (1950).

The "equal footing" clause refers to political rights and to sovereignty. Texas, supra at 1226.

As applied to ownership of navigable water it means equality with the 13 original states. Texas, supra at 1226.

As pointed out (supra, p.10) most of the original 13 states followed the common law and limited their claim of ownership to tidal waters. "Equal footing" as applied to states subsequently admitted would require nothing more than that the common law be followed which would limit the new states to rights in tidal rivers and would deny them any claim of proprietary ownership above salt water. This would be

especially true as applied to states such as Oregon which adopted the common law. (Supra, p. 11)

The "equal footing" doctrine has been misapapplied in that it has served as a basis for permitting newly admitted states to claim rights of ownership in navigable fresh water streams superior to those allowed the original 13 states.

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3.

Misunderstanding of the Designation in Admission Acts of Navigable Waters as Being "Common Highways and Forever Free".

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Most if not all of the admission acts contained a provision in substantially the following form:

> "... and said rivers and waters [those bordering the state], shall be common highways and forever free, as well as to the inhabitants of said State as to all of the citizens of the United States, without any tax, duty, impost, or toll therefor."(24)

The clause originated in the Ordinance of 1787 governing the Northwest Territory. Gould, Sec. 68, p. 139.

Of the provision Gould states:

"These provisions may now, perhaps, be regarded

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(24)Oregon Admission Acts, 11 Stat. 383 (1859)

> as declaratory of the modern rule that all rivers which are capable of navigation in their natural condition are subject to public use for that purpose, whether in other respects they are held to be private property or not. But at the time the Ordinance of 1787 was enacted, the question whether a fresh river is a public highway was thought to be dependent upon proof of long user by the public"

See also 78 Am.Jur.2d 530, Waters, Sec. 87.

The provision in the admission acts was a declaration of the existence of the public right of free navigation. 78 Am.Jur.2d 530, Waters, Sec. 87.

St. Paul & Pacific R.R. Co. v. Schurmeier, 7 Wall 272, 19 L.Ed. 74 (1868), in construing the meaning of an act of Congress containing the language of the Ordinance of 1787, stated:

> "Viewed in the light of these considerations, the court does not hesitate to decide, Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams shall be deemed to be, and remain public highways."

The decision is erroneous. The "public highway" status does not vest title in the state. 78 Am.Jur.2d 530, Waters, Sec. 87.

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4.

Misunderstanding by the State Courts of Their Authority to Claim or Disclaim Ownership of the Beds of Navigable Fresh Water Streams.

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If, as a multitude of authorities hold[25], each state became the owner of the land underlying navigable water within its boundaries, then there remained nothing for the state courts to decide as to the title. This has been ignored.

The courts of some states delayed extending the claim of ownership to the lands underlying navigable fresh water streams. 78 Am.Jur.2d 818, Waters, Sec. 381. The courts of many of the new states followed the common law (supra, p. 10 and following) while others ruled that the state owned between low waters (supra, p.11).

The federal courts acquiesced. Farnham, Sec. 10, p. 50.[26]

The acquiescence gave rise to the anomaly of

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[25] Farnham, Sec. 10, p. 49, citing Pollard v. Hagan, 3 How 230, 11 L.Ed. 574, and other authorities.

[26] "The extent to which the land under the waters passed to private holders of grants from the government of land on the shores is governed by the local law of the state." Citing Packer v. Bird, 137 US 661, 11 S.Ct. 210, 34 L.Ed. 819, and Port of Seattle, supra p. 22. 78 Am.Jur.2d 815, Waters, Sec. 379.

state courts summarily determining what land under water was owned by the state government and what was owned by the riparian.

The source of the power of the state court to give or withhold title to land is, at best, obscure. The federal and state courts acknowledge the power, as do the text writers, but none seems to identify the source. The power to accept or reject or to dispose of state lands should clearly be vested in the people or in the legislature or in the executive under a general grant of authority from the legislature. The state courts have established themselves as judges and juries and legislatures and executives as to the rights of private owners of property. That the right has been abused is demonstrated by the law of Washington where a riparian's rights can be denied or destroyed. Port of Seattle, supra p. 22.

Most states have adopted the common law, usually by constitutional and statutory enactments. 15A CJS 49, Common Law, Sec. 11. It is not the proper prerogative of the courts to refuse to follow the common law in determining the ownership of the beds of navigable fresh water streams. Nor is it sufficient to contend that "sovereignty" is the source of the states' power because the states have only the authority granted to them by their constitutions, all else being reserved to the people. 16 Am.Jur.2d 190, Constitutional Law, Sec. 17. With the possible exception of Washington the people of the states have not granted to their governments, and particularly to their courts, the right to declare what submerged land is public property and what submerged land is private property.

The courts, unrestricted in the exercise of a doubtful power, have deprived the riparian of his rights. The decisions may well constitute a taking of private property without compensation. Bonelli, supra, 38 L.Ed. at 540.

If in fact the ownership of the beds of navigable fresh water streams pass to the states as they gain statehood, there is nothing for the state courts to decide. If, on the other hand, title passes to the riparian, there is likewise nothing for the state courts to decide.

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5.

Misapplication of the Federal Definition of Navigability Adopted for Purposes of the Commerce Clause in the Determination of the Ownership of Beds Underlying Fresh Water Streams.

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Under the common law "navigable" referred solely to tidal waters. Farnham, Sec. 23(a), p. 104.

In time, for purposes of the application of the commerce clause and the exercise of admiralty jurisdiction the definition was expanded to include all waters which were in fact navigable. The Propeller Genesee Chief, 53 US 443, 13 L.Ed. 1058 (1851).

By 1876 the definition of navigability adopted

for purposes of the commerce clause and the admiralty jurisdiction of the federal government was used by the states as a basis for claiming ownership of the underlying beds. Barney v. City of Keokuk, 94 US 324, 24 L.Ed. 224 (1876). Smith, Sec. 41.2(B), p. 257. Barney justifies the extension of the ownership to fresh water on the basis there are numerous fresh water rivers in this country which are larger than those found in England. (24 L.Ed. at 228) No reason is given why ownership of the bed by the state is necessary.

Since Barney many states have adopted their own definition of "navigability" for purposes of enhancing their proprietary ownership. Smith, Sec. 42.2(B), p. 271. Such definitions cannot be justified on the basis of need for ownership to protect the public rights in the water.

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6.

Failure to Apply the Common Law.

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The basic fallacy which has led to the morass of law governing the ownership of the beds of navigable fresh water streams is the misconception that the state must own the bed of a stream in order to carry out its obligations to protect the public rights. The assumption results from the failure to distinguish between the public rights and the private rights. Proof that ownership of the bed is not requisite to protection of the public rights is furnished by states like Ohio and Kentucky which

border on the Ohio river the bed of which is owned by the riparians, and Illinois which borders on the Mississippi where the bed is likewise owned by the riparians, and Nebraska through which the Missouri flows the bed of which is owned by the riparians. There are many states through which our great rivers flow where the riparian owns to low water. In none of these is there a problem of the public rights being interfered with. Another example of the lack of need for the state to own the bed is in those states which claim ownership of the entire bed, such as Oregon and Florida and Iowa where, when an avulsive change takes place in a navigable river, the new bed remains in private ownership. There is no interference with the public rights because there can be none under the law.

In the early days in England where property concepts were but faintly perceived, it was thought necessary that someone should own the land under which sea-going ships navigated. The only logical person to have that ownership was the King. It was not conceivable that anyone else should have the ownership. Thus the doctrine of proprietary ownership developed. The King soon disposed of all the lands under water which could be profitably used by private individuals. Farnham, Sec. 36, p. 166.

In time the concept of a dual capacity of ownership, that in trust of the jus prublicum to protect the public and that of the proprietary ownership of the jus privatum, evolved. Farnham, Sec. 36, p. 167.

As to the beds of fresh water streams, while the matter was not resolved for some time, the King never seriously contended that he owned them.

Lord Hale resolved any dispute in his De Jure Maris. Farnham, Sec. 48, p. 239.

There is an incongruity in the law of those states which now have blended the public rights with the private rights into a concept of trust ownership. A trust requires a trustee and a beneficiary. There can be no trustee of property owned in fee. The two concepts are irreconcilable. There is a further anomaly in the concept. The riparian should be one of the beneficiaries of the trust, rather than the victim of it. He occupies a special status under the common law concept of the public rights. 78 Am. Jur.2d 830, Waters, Sec. 388.(27) The hypocrisy of the concept is manifested in states such as Oregon where the "sovereign" sells portions of the beds of navigable streams, sells the sand and gravel from them and charges for moorage rights, all the time contending that it holds the beds of its rivers in trust. None of these proprietary functions is requisite to the obligation of the state to protect the public rights. The state has surrendered most of that authority to the federal government which protects commerce and navigation.

The present diversity of law has resulted in gross inequality among private riparian owners in the different states. It has resulted in frequent

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(27)"Under the doctrine of state ownership in trust for the public, riparian proprietors are included among the cestuis que trustent, and have a special property right independent of the general public, the enjoyment of which in no wise conflicts with the exercise of legal ownership."

and complex litigation. It necessitates the determination of high water, low water, what is an accretion, what is a reliction, what is an island, does prescription apply against the state and does estoppel apply against the state. It has removed thousands of acres of land from the tax rolls. The state, as an absentee owner, is not truly concerned about the maintenance or the beauty of the exposed bed and banks of navigable rivers. It is not concerned about erosion of the bank. The rule of state ownership has made the riparian a trespasser for such simple uses as gaining access to the water when it is low. There is the very considerable question of what streams are navigable for purposes of determining ownership of the bed. There is the further complication of the effect of dams on high and low water and navigability which are to be determined when the river is in its "natural state". Bonelli, supra, 38 L.Ed. at 534, 78 Am.Jur. 2d 511, Waters, Sec. 67. There is the further problem of the ownership of the beds of streams once navigable which have ceased to be so.

There is a solution to the morass, best expressed by Farnham (after discussing the complexities of the present law):

> "It is believed by the present writer that the common law, if wisely and fearlessly applied in all cases, with such modification as changing circumstances may demand, is sufficient to solve all difficulties and to bring the entire mass of diverse law into a homogeneous code of rules, with no more uncertainty in their application than usually arises in the application of

any rule to diverse states of fact."

Farnham, Sec. 36, p. 165

Farnham then points out that it is the policy of our law to place everything in private ownership which is capable thereof. Sec. 50, p. 244.

Farnham further states:

> "The rule of the common law is definite and certain. It has solved all the problems for hundreds of years where it has been adopted; while the opposite rule is indefinite, uncertain, and the source of prolific litigation. By the common-law rule the title above tide water is in the riparian owner, subject to the public use.[28] Under that rule there is no temptation on the part of the state to interfere with the riparian rights of the abutting owner. The laws of alluvion and accretion have their full force and application; if the river changes or leaves its bed there is no uncertainty as to who owns the abandoned land; the public knows its rights and their limitations and there is little reason for any one to exceed his rights. This also disposes of the whole title, leaving no remnant to create uncertainty or disputes."

Farnham, Sec. 50, p. 245

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[28] The Admission Acts, supra p. 27, also insure the public right of navigation. Smith, Sec. 35.2(C), p. 183.

As noted in Gavit v. Chambers, 3 Ohio 496, cited and quoted by Farnham at page 245:

> "If the opposite rule [contrary to the common law] is adopted, at what point does the right of the owner terminate? On the top or at the bottom of the bank? At high or low water mark? Does the boundary recede and advance with the water? Or is it stationary at some point? And where is that point? Who gains by alluvion? Who loses by the direptions of the stream? No satisfactory rules can be laid down in answer to those questions, if the common law doctrine is departed from. It cannot be doubted that if the beds of rivers treated as navigable are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs."

The common law principle is easy of application. The federal and state governments would continue to be charged with their duty of protecting the public rights of navigation, fishery, recreation, and so forth. Thousands of acres of land would be placed on the tax rolls. Litigation would be minimized. The states would no longer be competing with riparians for property to be placed on the market, which is not a proper function of state government. Riparians would be protected in their proper rights.

SUMMARY OF PROPOSITION I

Bonelli, supra, 38 L.Ed. at 539, recognized the importance of protecting the riparian. The case also stands as precedent against giving the

state a windfall of unnecessary property, 38 L.Ed. at 540. The decision makes clear that the rights of the state in the river bed are limited, 38 L.Ed. at 540, and that the "nature and extent" of the states' title is to be determined under federal law.

For universal law to be successful it must be simple. It must be based on experience and it should have ample reliable precedent. By requiring the states to adhere to the common law all of these requirements are met within the limitations of our judicial system.

PROPOSITION NO. II

IN THE ABSENCE OF PLEADING AND PROOF THAT THE PUBLIC RIGHTS OF NAVIGATION, FISHERY AND RELATED USES ARE BEING IMPAIRED OR INTERFERED WITH THE STATE OF OREGON CANNOT RECOVER DAMAGES IN AN EJECTMENT ACTION FOR REMOVAL OF SAND AND GRAVEL FROM THE BED OF A NAVIGABLE FRESH WATER STREAM WHERE ITS CLAIM OF OWNERSHIP IS BASED ON SOVEREIGNTY RATHER THAN GRANT.

ARGUMENT

The Argument under Proposition I is incorporated by reference.

At common law the riparian could:

> "...make such use of the stone and sand in the bed of the stream as he can make without injury to other individuals or the public."
>
> Farnham, Sec. 473, p. 1602

Mississippi, which follows the rule that the state owns the entire bed of navigable fresh water streams (supra, p. 5), follows the common law. Archer v. Board of Commissioners, 158 Miss 57, 130 So. 55, 56 (1930).

Bonelli, supra, declared: "The State's title is to the 'river bed as a bed'." (38 L.Ed. at 536) citing State v. Gill, 259 Ala 177, 181, 66 So.2d 141, 145 (1953). In Gill the Alabama court stated of the state's ownership of the bed of a navigable fresh water stream:

> "...is a title to the bed as a bed and not the individual grains of sand or lumps of mud that constitute the land making up the bed."

State is seeking the sand and gravel, not because it has any use for it, but because it wishes to generate revenue for the state treasury. The production of revenue is not sufficient to give the state title to the sand and gravel. Farnham, Sec. 50, p. 244[29], Port of St. Helens v. Oregon, Civil

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[29]"There is, undoubtedly, a perceptible advantage in owning land adjoining a navigable body of water. So plainly is this true that in all new countries settlers locate upon such waters before they do further inland, and the course of commercial activities follows very closely the lines of navigable waters. To deprive such a settler of his advantage is to take from him a portion of the value of his property. In addition to this there is a

No. 74-572 (D. Or. August 28, 1975, modified October 2, 1975), p. 47 addendum to this brief.[30]

SUMMARY OF PROPOSITION II

The state does not own the beds of navigable fresh water streams as set out under Proposition I.

If it does own the beds, the interest is limited, Bonelli, supra, 38 L.Ed. at 540, and does not include the individual grains of sand or gravel.

Corvallis Sand removed material from the bed of the river under permits issued by the Corps. (Exs. 280-307.) The permits are incontrovertible evidence that the public right of navigation was not being interfered with. State did not plead nor offer any evidence showing that Corvallis Sand's operations

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value in the use of the bed and shores of the water which can be availed of in subordination to the public right of navigation, and which is very material. A forceful illustration of this is the fact that in almost every instance when a state has established its title as against the riparian owner it has immediately proceeded to grant the bed and shores, or a portion thereof, thereby making a revenue for its own use. Furthermore, it is the policy of our law to place everything in private ownership which is capable thereof."

[30] This case is as yet unreported. It is set forth in its entirety as an addendum to this brief, commencing p. 47:

"The State argues that it needs Dibblee Point to provide public recreation, to provide access to the River, to protect wildlife, to permit

in any way interfered with any other aspect of the public rights.

The issue is whether or not the state can claim ownership of sand and gravel in order to make a profit. The authorities are overwhelming against such a position.

CONCLUSION

As late as 1860 the law was settled that the riparian owned the beds of fresh water streams. This court in deciding the ownership of accreted land below high water on the Mississippi river in Missouri stated:

> "We think this [that the riparian title went to the middle thread of the stream], as a general rule, too well settled, as part of the American and English law of property, to be open to discussion; ... The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case;

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development of water-dependent commerce and industry, and to provide revenue for the common school fund. The State introduced no evidence to prove these interests nor did it introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in the State."

nor does the size of the river alter the rule. To hold that it did, would be dangerous tampering with riparian rights, involving litigation concerning the size of rivers as a matter of fact, rather than proceeding on established principles of law."(31)(32)

Jones v. Soulard, 24 How 41, 16 L.Ed. 604, 609 (1860)

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(31)The syllabus of the defendant in error contains the following pertinent analysis:

"By reference to the decisions of the Supreme Court of the United States since Pollard v. Hagan, it will be seen that while the doctrine of that case has been repeatedly reaffirmed, scrupulous care has been used to restate that doctrine as it was in the first place laid down, and to limit the decision by the circumstances under which it was made, viz: that land flowed by the sea at ordinary high tide, if not previously disposed of by the United States, became the property of the State on its admission to the Union. This careful reference to tide water [9 How. 471; 59 U.S. (18 How.) 71-74], and the distinction taken as lately as 13 How., 416,422, between fresh-water streams and the arms of the sea, properly so called, are abundantly sufficient to show, if illustration were needed, the accuracy with which the doctrine declared in Pollard's Lessee v. Hagan, was adapted to the particular facts of that case, and how little it was the purpose of this court to leave any one at liberty, first to misconstrue and then misapply the decision in that cause."

(32)This court ignored the state law of Missouri that the riparian's ownership extends to low water,

That opinion is based on sound principles of property law. Over the years those principles have been misunderstood and misapplied and have been cut into by such irrelevancies as "equal footing", "public highway", and "navigable" until today no other question in the law has evoked such confusing and conflicting rulings.

Through all of it, the riparian has been the victim. He has been pushed into a unique status in the law where rights which the law had historically declared to be his have been arbitrarily cut into or emasculated by the state courts. No voice seems to have been raised to defend the riparian on the ground his property rights were being taken without just compensation. There is no parallel in the law where vested property rights have been so subjected to the whims of the courts. With all due respect, those courts too often have been motivated by the desire to put revenue into the state treasuries. To accomplish this, precedents have been ignored or misinterpreted, historical facts distorted or misunderstood.

In Barney (supra 24 L.Ed. at 228) this court stated that the resolution of the rules of property "properly belongs to the states by their inherent sovereignty." That decision was rendered exactly 100 years ago. In the meantime the states have continued to pursue their quest for more revenues for the state treasury, have further complicated the legal problems involved in this important area, and have failed to clear up the confusion.

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and declared as a matter of federal common law that the ownership extended to the thread of the stream.

Due process is an over-riding issue:

"Finally, recognition of the State's claim to the subject land would raise a serious constitutional issue as to whether the State's assertion of title is a taking without compensation, a question which we find unnecessary to decide on our view of the case. As Mr. Justice Stewart warned in Hughes v. Washington, 389 US 290, 298, 19 L Ed 2d 530, 88 S Ct 438 (1967) (concurring opinion):

> 'Although the state made no attempt to take accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private property into public property without paying for the privilege of doing so. The due process clause of the 14th Amendment forbids such confiscation by the state no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate.'"

Bonelli, supra, 38 L.Ed. at 540, 541

For two centuries state courts, with the approval of this court, have in many jurisdictions retroactively severed from the riparian the rights of property which are properly his. It is illusory to believe that those same courts will now restore riparian rights.

It is correct to say that "...federal law must be applied with a view towards the limited nature of

the sovereign's rights in the river bed, ..." Bonelli, supra, 38 L.Ed. at 540. The limited right is the jus publicum for the protection of the public rights of navigation and related uses. The sovereign can maintain ejectment to remove a nuisance which interferes with navigation. It can protect the public right to use the river for recreational purposes. But, despite the parroting of misunderstandings as to "equal footing", "public highways" and "navigable" by the law(33), the sovereign cannot claim any proprietary interest in the beds of fresh water streams.

The only remedy is for the court to restore the rights of the riparian through the application of tested and proved principles of property and constitutional law.

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There is no authority to support a contention by the state that it needs the sand and gravel. Its objective is to obtain ownership of the sand and gravel so that it can sell it.

Unless the principle of separation of the public rights from the private rights is to be abandoned, it can only be concluded that the removal of sand and gravel is in no way connected with the public rights when such removal is authorized by the Corps. The protection of the public rights does not

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(33) For an anlysis of the inconsistencies of court decisions see Farnham, Sec. 50, pp. 246 through 249.

require or justify the granting of the ownership of sand and gravel to the state. Bonelli, supra, 38 L.Ed. at 539-41, recognized the importance of riparianess. It also recognized that the state owns the bed "as a bed" and cited Gill, supra, which held unequivocally that the state does not own the "individual grains of sand or lumps of mud".

On the basis of precedent which makes sense it should be declared that the state does not own the sand and gravel in the bed of a navigable fresh water stream and that it cannot recover damages therefor.

RELIEF REQUESTED

Corvallis Sand should be awarded all of the disputed property free and clear of any claim of State. The judgment awarding damages to State should be set aside.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SOLOMON, Judge:

The Port of St. Helens (Port) and the State of Oregon (State) each claim ownership of Slaughter's Bar, a 160-acre tract of land along the Oregon side of the Columbia River (Columbia or River). The disputed land is part of a larger tract known as Dibblee Point, which developed on the bed of the Columbia as a result of navigation projects of the United States Army Corps of Engineers (Corps). The Port asserts rights as owner, and former owner, of the uplands to which the disputed land attached. The State asserts ownership as titleholder to the bed of the Columbia.

The Columbia River is a navigable waterway of the United States. Since 1877, the Corps has engaged in a program to maintain the navigable capacity of Slaughter's Bar. At first the Corps periodically dredged the existing navigation channel, which was located on the Washington side of the Bar. This was not effective because of the configuration of the River. The Columbia at Slaughter's Bar is wider than the River upstream. As the River entered the Bar, it slowed down and precipitated waterborne silt.

To remedy this problem, the Corps proposed to artificially narrow the River by the construction of pile dikes.[1/] The River, once constricted,

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[1/] Pike dikes generally consist of two rows of

would run faster and produce a self-scouring channel. The Corps also proposed to relocate the navigation channel to the main stream of the River, nearer to the Oregon shore.

Congress approved the Corps' proposal in 1912. From 1917 to 1925, five pile dikes were built which extended perpendicular to the Oregon shore. In 1960, four of the five dikes were extended.

The pile dikes did not completely eliminate the need to dredge the channel. Initially, the dredge spoils from the dredging were deposited near the outboard end of the dikes. This increased the efficiency of the dikes. Later, spoils were deposited closer to the shore.

Gradually, the accumulated dredge spoils and the silt formed a land mass on the bed of the River. By 1940, areas of the mass near the shore were exposed, and by 1973 a 290-acre tract of dry land approximately two miles long and one-quarter mile wide had developed along the Oregon shore of

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timber pilings driven into the bed of a waterway and extending perpendicular to the shoreline. Stone is usually placed along the base of the dike. A pile dike will reduce the velocity of the flow of the river through the dike, while increasing the flow of the river channelward of the dike. As the river passes through the dike, riverborne sediment deposits on the downstream side of the dike. The increased flow and volume through the navigation channel which is caused by the dike reduces or eliminates the deposit of sediment in the channel.

Slaughter's Bar. This tract is Dibblee Point. The Port purchased approximately 130 acres of Dibblee Point from the State. The remaining 160 acres are in controversy.

Before 1968, the Port owned all of the uplands to which Dibblee Point attached. In 1968, the Port sold some of this land to Columbia County, but reserved to itself all rights to that part of Dibblee Point which abutted the conveyed tract. The Port now asserts ownership of Dibblee Point as owner, and former owner with reserved rights, of the upland to which Dibblee Point attached. The Port wants to use the land for commercial purposes.

The State contends that it owns Dibblee Point as former owner of that part of the bed of the Columbia on which the land developed. Although the State argues that ownership of Dibblee Point is necessary to provide public recreation, protect wildlife, provide access to the River, permit development of water-dependent commerce, and provide revenue, it does not object to the Port's development of Dibblee Point as a commercial facility.[2/]

[2/] Pursuant to ORS 274.925(1), the Port may purchase Dibblee Point from the State, and the State must sell Dibblee Point to the Port if the Port elects to buy the land within one year after formal notification by the State that the land has formed and if the State does not find, after a hearing, that the land is necessary for recreation, conservation of fish and wildlife, or the development of navigation facilities. ORS 274.940. The record does not show that the notice required by ORS 274.925(1)

The facts in this case are similar to those in Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). There the Bonelli Cattle Company purchased from the Santa Fe Pacific Railroad a large tract of land on the east shore of the Colorado River. Gradually, the River moved eastward until only a small portion of the original tract remained. In 1955, the plaintiff purchased all of the original tract. Four years later, the federal government deepened and rechanneled the Colorado River. As a result, the stream of the River was confined to a substantially reduced portion of the Bonelli property, and new land on both sides of the River emerged. Bonelli claimed title to the new land on the east side of the River. Even though Arizona did not participate in the project, it, too, claimed title to this land.

The new land in Bonelli was created in much the same way that Dibblee Point was created. The land was formed in part by the precipitation of waterborne sediment and in part by the deposit of dredge spoils, all resulting from the project.[3/] The only

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has been given or that a finding under ORS 274.940 has been made.

The manager of the Port of St. Helens testified that since 1969 the parties have agreed that the 160 acres in dispute should be developed for industrial and commercial purposes.

[3/] Although the Supreme Court opinion does not set forth the manner in which the land was created, the Supreme Court referred with approval to an Arizona Law Review article which analyzed the Arizona Supreme Court's opinion in Bonelli. The author of

factual distinction between the cases is that the new land in Bonelli was reemerged land which was formerly held by Bonelli's grantor, then submerged, and then again exposed. The Supreme Court did not consider this fact to be material to its decision. 414 U.S. at 330 n. 27.

The State argues that Dibblee Point, unlike the land in Bonelli, developed as an island or an island group. The State asserts that, under common law, title to islands formed by accretion rests in the State and that accretions to islands, even if they attach to the land of a riparian, also belong to the State. The evidence shows that Dibblee Point, as it evolved, was not independent from the shoreline. It was never surrounded on all sides by a channel of the River. The portions of the mass which did emerge offshore were not permanent, had little vegetation, and generally were not elevated above ordinary high water. In my view, there is no

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the article stated:

> "The dredging process undoubtedly affected the flow and currents of the river and produced three separate effects . . . . The dredging probably raised a great deal of sediment facilitating local alluvion deposition contemporaneously with the reliction of the waters caused by the deepening and narrowing of the channel. Third, spoil dredged from the river bed was deposited toward the banks of the river adding appreciably to the land accumulation." Lundquist, Artificial Additions to Riparian Land: Extending the Doctrine of Accretion. 14 Ariz. L.Rev. 315, 333 (1972)

merit to the State's contention. See McBride v. Steinweden, 72 Kan. 508, 83 Pac. 822 (1906).

The Court in Bonelli held that federal common law determines ownership. That law requires an analysis of the competing interests of the riparian and the state "in light of the rationales for the federal common-law doctrines of accretion and avulsion," and in light of the "limited nature of the sovereign's rights in the river bed." 414 U.S. at 328. If "the land was exposed as part of a navigational or related public project of which it was a necessary and integral part", the new land is treated as an avulsion and title vests in the state. 414 U.S. at 323, 328. If it was not, then it is treated as an accretion, and title vests in the riparian. 414 U.S. at 328.

The Bonelli Court awarded title to the riparian owner on two grounds. First, there was "no showing that the rechannelization project was undertaken to give [Arizona] title to the [new land] for the protection of navigation or related public goals." 414 U.S. at 323. Instead, the land developed incidentally to a project in which the State did not participate. It was a "windfall". 414 U.S. at 322-23. Second, Arizona did not assert any public need for the new land. 414 U.S. at 323 n.15, 331.

The Court did not decide what interests Arizona could have successfully advanced in asserting title. 414 U.S. at 323 n. 15. However, in dicta the Court said that the state may prevail only when ownership

of new land is necessary to protect fishing, navigation and commerce in the river.[4/] See State Land Board v. Corvallis Sand & Gravel, 99 Or. Adv. Sh. 1532, 1541 (Ct. of App. 1974), aff'd, ___ Or. ___ (1975).

Here, as in Bonelli, the land developed incidentally to the primary project. There is no evidence that the State purposely created Dibblee Point with the intent that it would own Dibblee Point to promote any particular interest. In fact, there was no showing that the State participated in the project.

The State argues that it needs Dibblee Point to provide public recreation, to provide access to the River, to protect wildlife, to permit development of water-dependent commerce and industry, and to provide revenue for the common school fund. The State introduced no evidence to prove these interests nor

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4/". . . Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State. See Michaelson v. Silver Beach Assn., 342 Mass. 251, 173 N.E.2d 273 (1961)

". . . [L]and surfaced in the course of such governmental activity should inure to the riparian owner where not necessary to the navigational project or its purpose." 414 U.S. at 329.

See also 414 U.S. at 323, 328.

did it introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in the State.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a)

Plaintiff is directed to prepare a judgment vesting title to the disputed land in the Port.

No costs.